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No. 83-2129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA R. SCHREIBER,

Petitioner,

– against –

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, and THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M.R. ENGLER, JR., W.C. HENDERSON, R.S. MORRIS, M.A. EHRLICK, A.M. DERRICK, RICHARD L. McCONN, D.J. MacIVER, JR. and L.M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, J.R. HUBBARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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LISTING PURSUANT TO RULE 28.1

The following is a list of all subsidiaries, except wholly owned subsidiaries, and affiliates of Burlington Northern Inc., R-H Holdings Corporation and The El Paso Company:

Butte Pipe Line Company
Portal Pipe Line Company
New Mexico and Arizona Land Company
The Belt Railway Company of Chicago
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
The Denver Union Terminal Railway Company
Galveston Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
The Lake Superior Terminal and Transfer Railway Company
Longview Switching Company
The Minnesota Transfer Railway Company
Paducah & Illinois Railway Company
Portland Terminal Railroad Company
The Pueblo Union Depot and Railroad Company
The Saint Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company
Winona Bridge Railway Company
Lake Country
Windjammer, Inc.
Adams Canyon Ranch
Santa Paula Farms
El Paso Natural Gas Company
El Paso Europe-Afrique, S.A.
Minera San Pedro Corralitos, S.A.

QUESTIONS PRESENTED

1. In the absence of any allegation of deception by the defendants, does the alleged breach of a tender offer contract state a cause of action for "manipulation" under Section 14(e) of the Williams Act, 15 U.S.C. § 78n(e)?

2. Is there a direct conflict on an important issue of federal law between the holding of the Third Circuit in this case and the holding of the Sixth Circuit in *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981)? The Third Circuit held below that Section 14(e) of the Williams Act was not violated when an offeror terminated its tender offer prior to the "withdrawal date" of that offer, and commenced a new tender offer at the same price but for a smaller number of shares. The Sixth Circuit held in *Mobil* that a "target company" violated Section 14(e) when it granted options to purchase a large block of its stock and its "crown jewel" asset to a friendly offeror, thereby thwarting the tender offer of a second, "hostile" bidder.

STATEMENT OF THE CASE

Respondents take exception to the argumentative "Statement of the Case" contained in Petitioner's Supporting Brief, and refer this Court to the opinion of the District Court below (App. B 4-7) for an accurate summary of the relevant facts. However, Respondents do wish to correct one particularly misleading portion of the Petitioner's Statement of the Case – that Burlington "controlled" El Paso when the December offer was terminated on January 10, 1983.

Petitioner states that (i) "the December offer...had a *deadline* of December 30, 1983 [sic]", (ii) "by the December 30, 1983 [sic] deadline, the December tender offer was fully subscribed and Burlington had majority control of El Paso", (iii) "Burlington 'locked-up' El Paso since the accepted December offer blocked other offers and artificially impacted the market price" and (iv) "during the interval when the first offer was accepted, no one else would make a tender offer". Pet. Br. at 4, 6-7. None of these statements is true. As required by Section 14(d) of the Williams Act, 15 U.S.C. § 78n(d), and the regulations of

the Securities and Exchange Commission, Burlington's December offer provided (i) that all shares tendered into the offer could be withdrawn at any time prior to January 12, 1983 and (ii) that Burlington could not purchase any shares of El Paso stock until January 19, 1983. *See* Rules 14d-7 and 14e(1)(a), 17 C.F.R. §§ 240.14d-7, 240.14e(1)(a). Thus, when the December offer was terminated the withdrawal date for the offer had not expired, all El Paso shareholders were free to withdraw any shares which they had tendered into the December offer, and tender into a higher, competing offer or sell in the market; in *no* sense can Burlington be deemed to have "controlled" El Paso on Janurary 10, 1983.[1]

SUMMARY OF ARGUMENT

1. The decision below is clearly correct and is controlled by decisions of this Court in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), and *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977). In the absence of deception, there is no claim for "manipulation" under Section 14(e) of the Williams Act. As the District Court held in this case, the Sixth Circuit's decision in *Mobil Corp. v. Marathon Oil Corp.*, 669 F.2d 366 (6th Cir. 1981), is "an aberration in this field of the law" (App. B 21), is inconsistent with the legislative history of the Williams Act and the decisions of this Court, and has been soundly rejected by virtually all courts which have considered the issue.[2]

---

[1] Equally false is Petitioner's assertion that the termination of the December offer was "manipulative" because it "occurred after the offer had...become legally binding." Pet. Br. at 27. As the United States District Court for the District of Delaware recently noted, in dismissing another plaintiff's attempt to fashion a § 14(e) claim out of these facts: "Because the December offer contained a number of conditions, some of which occurred, the December offer could have been terminated and withdrawn any time after December 17, 1982, and prior to acceptance by Burlington and R-H [Holdings Corporation] for payment". *Brill v. Burlington Northern Inc., et al.*, Civ. Act. No. 83-345 (D. Del., July 13, 1984), Slip op. at 9.

[2] This Court has recently denied certiorari in two cases rejecting *Mobil*, and involving circumstances far closer to the *Mobil* circumstances than those involved in the present case. *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1326 (1984); *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757 (2d Cir.), *cert. denied*, 104 S. Ct. 550 (1983).

2. In any event, there is no direct conflict between the *Mobil* decision and the present case. In *Mobil*, the Sixth Circuit held that a target company's grant of irrevocable options to purchase its most valuable asset and a large block of stock – to be exercised only if a hostile bidder gained control of the target – was a "manipulative act" under Section 14(e) because it "completely block[ed] normal market activity" in the company's stock. The termination of the December offer and commencement of a new offer by Burlington had no such effect on normal market activity and, indeed, provided the opportunity for further competitive bidding for the stock. This is, therefore, a particularly inappropriate case to consider the *Mobil* theory, since even if *Mobil* had been accepted by the Third Circuit, the result would have been the same. As the Court of Appeals put it, the present complaint "seeks to convert an arguable breach of contract into a violation of the Williams Act." (App. A 5). This has nothing whatever to do with the matter at issue in *Mobil*.

Accordingly, Respondents respectfully request that certiorari be denied.

ARGUMENT

I.

THE DECISION BELOW IS CORRECT AND IS IN FULL ACCORD WITH THE CONTROLLING DECISIONS OF THIS COURT

In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), this Court exhaustively reviewed the legislative history of the Williams Act and concluded that the Act "was designed *solely* to get needed information to the investor". *Id.* at 31 (emphasis supplied). *Accord, Edgar v. MITE Corp.*, 456 U.S. 624, 639 (1982) ("Both the House and Senate Reports observed that the Act was 'designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision'"); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) ("[t]he purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information...").

In accord with this legislative history, the federal courts, including the Third Circuit here, have held with virtual unanimity that "[a]n essential ingredient of a section 14(e) cause of action...is misrepresentation, *i.e.*, the omission or misstatement of material facts." *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757, 760 (2d Cir.), *cert. denied*, 104 S.Ct. 550 (1983). *See, e.g., Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 104 S.Ct 1326 (1984); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 288 n.10 (4th Cir. 1983); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 282-283 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Swanson v. Wabash, Inc.*, 577 F. Supp. 1308, 1314-16 (N.D. Ill. 1983); *Martin Marietta Corp. v. Bendix Corp.*, 549 F. Supp. 623, 628 (D. Md. 1982).

As both the District Court and the Third Circuit recognized in the present case (App. A 8-9, App. B 22, 27), this is the central teaching of this Court's decision in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977).[3] In holding that the phrase "manipulation" in Rule 10b-5 did not include "instances of corporate mismanagement...in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary," *id.* at 477, the Court reaffirmed that "the 'fundamental purpose' of the [Exchange] Act [is] implementing a 'philosophy of full disclosure,'" *id.* at 478, and that when "the cause of action [is] one traditionally relegated to state law,...it is entirely appropriate...to relegate [the plaintiff] to whatever remedy is created by state law." *Id.*[4]

[3] In dismissing the Petitioner's complaint, the District Court stated:

> This case is the perfect example of a plaintiff, who may have nonfrivolous claims based on state law for breach of contract, tortious interference with contract, breach of fiduciary duties and perhaps even conspiracy, attempting to characterize those state law claims as violations of the federal securities laws. This ploy, however, has been foreclosed since *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977). In that case, the Supreme Court held that courts should be reluctant to federalize a substantial portion of corporate law traditionally left to state regulations. Accordingly, it will be the Delaware Chancery Court, in its pending action, which will appropriately decide those corporate law issues. (App. A 27).

Petitioner contends that "Section 14(e) prohibits manipulation without requiring an element of deception". Pet. Br. at 14-18. But the two decisions of this Court on which she purports to rely, *see id.* at 17, confirm precisely the opposite conclusion. Thus, in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), this Court stated that manipulation is "intentional or willful conduct designed to *deceive* or defraud investors by controlling or artificially affecting the price of securities." *Id.* at 199 (emphasis supplied). And, in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), the Court, after stating that "nondisclosure is usually essential to the success of a manipulative scheme," *id.* at 477, defined manipulation as activities "that are intended to *mislead* investors by artificially affecting market activity." *Id.* at 476 (emphasis supplied)."[5] In short, "Congress's ban on 'manipulative acts and practices' was directed only at rigged transactions that might mislead investors." *Buffalo Forge Co. v. Ogden Corp., supra*, 717 F.2d at 760.

Nothing of the sort is alleged in the Petitioner's complaint; quite the contrary, as the District Court noted, "[a]ll activity of the defendants that could have conceivably affected the price of the El Paso shares was done openly." (App. A 20).

[4] *quoting Cort v. Ash*, 422 U.S. 66, 78, 84 (1975), and *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 40, 41 (1977). It is well-established that "given the similarity of purpose of [§§ 10(b) and 14(e)]," the teachings of *Green* are equally applicable to § 14(e). *Berman v. Gerber Products Co.*, 454 F. Supp. 1310, 1318 (W.D. Mich. 1978), *quoting Altman v. Knight*, 431 F. Supp. 309, 314 (S.D.N.Y. 1977). *See also, Swanson v. Wabash Inc.*, 577 F. Supp. 1308, 1314 n.9 (N.D. Ill. 1983); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 282-283 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Seaboard World Airlines, Inc. v. Tiger International, Inc.*, 600 F.2d 355, 358 n.3 (2d Cir. 1979).

[5] The examples of "manipulation" the Court gave were "wash sales, matched orders, or rigged prices," *Green, supra*, 430 U.S. at 476 – devices "used to persuade the public that activity in a security is the reflection of supply and demand instead of a mirage." *Billard v. Rockwell International Corp.*, 526 F. Supp 218, 222 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 51 (2d Cir. 1982).

In seeking certiorari, Petitioner relies almost exclusively upon the Sixth Circuit's decision in *Mobil Corp. v. Marathon Oil Corp.*, 669 F.2d 366 (6th Cir. 1981), which, to Respondents' knowledge, is the *only* case which has *ever* found a violation of Section 14(e) in the absence of deception. Indeed, *Mobil* has been specifically rejected by at least two federal courts of appeals in similar situations;[6] as the District Court in the present case noted, *Mobil* is now considered to be an "aberration in this field of the law." (App. A 21). *See, e.g., Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757, 760 (2d Cir.), *cert. denied*, 104 S.Ct. 580 (1983) (*Mobil* is "an unwarranted extension of the Williams Act"); *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1, 5 (2d Cir. 1983), *cert. denied*,104 S.Ct. 1326 (1984) (rejecting *Mobil* "to the extent that *Marathon* creates judge made substantive obligations imposed upon offerors or the management of offerees engaged in a tender offer contest"); *Martin Marietta Corp. v. Bendix Corp.*, 549 F.Supp. 623, 628, 630 (D. Md. 1982) (*Mobil* rests upon "an exceptionally strained interpretation of *Santa Fe*", which ignores the Supreme Court's admonition in *Piper* that 'Section 14(e) is solely a disclosure provision'); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 288 n.10 (4th Cir. 1983) (*Mobil* "has been criticized as inconsistent with the teachings of [*Green*] and [*Piper*] where the Supreme Court strongly indicated that deception is a predicate to a Section 14(e) claim"); *Swanson v. Wabash, Inc.*, 577 F.Supp. 1308, 1315 (N.D. Ill. 1983) (*Mobil* "flies in the face of the established [Supreme Court] interpretation of [§ 14(e)]").[7]

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[6] Petitioner's suggestion that the Ninth Circuit has also "adopted the Sixth Circuit's approach," Pet. Br. at 9, is based on a single sentence of *dictum* in *Pacific Realty Trust v. APC Investments, Inc.*, 685 F.2d 1083 (9th Cir. 1982), that "there are instances when violations of [Section 14(e)] are unrelated to the information supplied to the shareholders". *Id.* at 1086. Significantly, the holding of the Ninth Circuit in that case was that "full disclosure here would adequately protect the [target] shareholders as required by the Williams Act." *Id.* at 1087.

[7] Petitioner also argues that "relegating the injured parties to state court actions allows each state to fashion inconsistent remedies and relief or no remedy", Pet. Br. at 29, and that therefore "the need for uniformity", *id.* at 31, compels the expansive interpretation of "manipulative act" which she urges upon this Court. Petitioner ignores that precisely the same argument was made and rejected by this Court in *Santa Fe v. Green:*

> "Absent a clear indication of congressional intent, we are reluctant to federalize the subtantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.
>
> • • •
>
> There may well be a need for uniform federal fiduciary standards to govern mergers such as that challenged in this complaint. But those standards should not be supplied by judicial extension of § 10(b) and Rule 10b-5 to 'cover the corporate universe'."

Green, supra, 430 U.S. at 479-80.

Four bills to amend the Williams Act are currently pending before Congress, so that Congress will soon have an opportunity to express its intent as to whether the Williams Act should be broadened in any way. H.R. 5693, 5694, 5695, 5696, 98th Cong., 2d Sess., 130 Cong. Rec. H.4359-60 (May 22, 1984).

II.

THE DECISION BELOW DOES NOT CONFLICT WITH THE SIXTH CIRCUIT'S DECISION IN MOBIL

Even if there were a significant issue as to the continued viability of *Mobil*, this hardly would be an appropriate case to consider it, since the relevant facts and circumstances here bear no resemblance to those in *Mobil*. In *Mobil*, the target company (Marathon) granted U.S. Steel, a favored "white knight," an irrevocable option to purchase Marathon's most valuable asset (the Yates Field Oil reserve), to be exercisable only if a hostile bidder (such as Mobil) gained control of Marathon, and also granted to U.S. Steel an option to purchase its stock at a reduced price. On these unique facts, the Sixth Circuit held that Marathon's grant of these "lock-up" options to U.S. Steel constituted a "manipulative scheme" under Section 14(e), because it "not only artificially affect[ed], but for all practical purposes completely block[ed], normal healthy market activity and, in

fact, could be construed as expressly designed solely for that purpose." *Id.* at 374.[8]

The alleged breach of the tender offer contract in the present case has no conceivable similarity to these facts. As noted above, the options in *Mobil* were "manipulative" because their effect was to artificially and significantly *discourage competitive bidding* for the Marathon stock," *Mobil*, *supra*, 669 F.2d at 376 (emphasis supplied). Nothing of the kind occurred here. The termination of the December offer had nothing to do with the bidding process for El Paso stock, which had not, in any event, produced any competitive offer. Indeed, the termination of the December offer can be said to have facilitated "competitive bidding" by providing an *additional* fifteen business days (the withdrawal period under the new offer) for another company to make a competing bid for El Paso. *See* 17 C.F.R. § 240. 14d-7(a)(1). Moreover, in stark contrast to *Mobil*, none of El Paso's assets were disposed of or altered in any way; they would have been intact for any winning bidder.[9]

Because the termination of the December offer in no way thwarted the bidding process for El Paso, the Third Circuit's broader rejection of *Mobil*'s holding that deception is not a necessary element of the "manipulative act" prohibited by § 14(e) – while manifestly the correct legal result – was not necessary to the decision of the court below; even if the Third Circuit had accepted and applied the *Mobil* decision, the Petitioner's complaint would nevertheless have been properly

[8] Normal market activity was blocked, for example, because even if another bidder would otherwise have chosen to compete on the economic merits with U.S. Steel, it would have found that Marathon's most valuable asset, described by the Sixth Circuit as Marathon's "crown jewel," 669 F.2d at 367, was gone.

[9] Thus, Petitioner's assertion that defendants "prevented a free market", Pet. Br. at 23, and "locked out competing bids", *Id.* at 27, is simply empty rhetoric designed to twist the facts of this case into the "lock-up" language of *Mobil*. Indeed, petitioner's protest that "the case at bar...does not involve a claim of mere breach of fiduciary duty", *Id.* at 23, is belied by her Brief, which argues that "the termination of the December offer served no purpose other than enabling El Paso's management to protect themselves". *Id.* at 27. This is, of course, the classic language of a breach of fiduciary duty claim.

dismissed. For this reason, the Third Circuit has not "rendered a decision in conflict with the decision of another federal court of appeals on the same matter", Rule 17.1(a) of this Court, and this Court should not grant certiorari.[10]

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court deny the Petitioner's application for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Dated: July 25, 1984

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[10] Indeed, as noted, this Court recently denied certiorari in two cases presenting facts which were infinitely closer to the *Mobil* facts than Burlington's purported "manipulative" termination of its December tender offer. *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 1326 (1984) (no § 14(e) violation when, in response to hostile tender offer, favored bidder granted an option for 200% of the presently outstanding voting shares of the target, "the practical effect [of which] was to guarantee that [bidder] could acquire [target] by exercising the option, no matter how many of the outstanding shares were tendered to [the hostile bidder]"); *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757 (2d Cir.), *cert. denied*, 104 S.Ct. 550 (1983) (sale and option equal to 21% of target's stock to a "white knight" in response to a hostile offer not a § 14(e) violation).

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